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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AMICUS CURIAE.

WILLIAM B. MCILVAINE,
120 West Adams Street,
Chicago, Illinois,
Amicus Curiae.

THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST ADAMS, CHICAGO

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No. 667.

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

BRIEF FILED BY THE UNDERSIGNED IN SUPPORT OF PETITION FOR CERTIORARI OF ANNISTON MANUFACTURING COMPANY.

I respectfully request the court to grant the Petition for Certiorari filed by Anniston Manufacturing Company, Petitioner, in the above entitled cause for the following reasons:

1. If the opinion of the Court of Appeals for the Fifth Circuit is a true interpretation of the law, then taxpayers whose taxes are paid are no longer protected by the Fifth Amendment to the Constitution in any case.

2. With respect to all new taxes imposed, the only recourse of the taxpayer will be by way of injunction. The system of corrective justice which has been established by payment of taxes first and refunds afterward will be completely broken down; great additional burdens will be placed upon the taxpayers; and the Government will be deprived, or delayed in collecting, a great amount of revenue.

In support of the foregoing statements, we submit the following:

The principal part of the opinion of the Court of Appeals in the above entitled cause is directed to a consideration of whether or not the action brought against the Collector is a suit at common law or is a statutory suit really against the United States.

The court has devoted a part of the opinion to the question of whether or not the 1936 Act is in conformity with due process of law. But no opinion is expressed on this fundamental issue. For after the statement made on this subject, the court then says that "We are persuaded that we should not enter upon either a discussion or a decision of" this subject "for we are convinced that appellants have failed to establish their first point, to which the second, which they and appellee so fully discuss, is completely subordinate, that the suits they seek to maintain are really personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the collector."

It is possible that the Court of Appeals thought that the question of whether or not the 1936 law is consistent with the Fifth Amendment, should be presented in a suit brought pursuant to the provisions of the 1936 law. But this is not even intimated in the opinion and it could hardly have been in the mind of the court because, under the 1936 Act, no suit can be brought except upon a claim for refund previously filed as described in that act. Such claims for refund are limited to the type of claim provided in the 1936 Act. Any taxpayer suing under that act must sue upon a limited claim showing the extent to which he has "passed on" the tax, either directly or indirectly. The taxpayer under the 1936 Act is not allowed to sue for the entire claim. Any claim

which the taxpayer files under the 1936 Act would not be consistent with the Act of 1936 if he sued for the entire claim alone. Therefore the unconstitutionality of the 1936 Act is properly presented in the above entitled cause.

So that the whole effect of the opinion is that, by statute, Congress has changed a suit against the collector into a suit against the United States; that the United States being a sovereign, has the right to withdraw its consent to be sued; and that therefore this suit cannot be maintained because that consent has been withdrawn.

It must be remembered that when the taxes in question were paid the taxpayer had no right to obtain an injunction against their payment because the statutes then provided that no injunctions could be obtained for the reason that if taxes were illegally or erroneously collected, the taxpayer had a complete remedy by way of a complete refund. If the taxpayer had asked for an injunction on the ground that Congress might later withdraw its right to be sued, the theory would have been fantastic and the injunction denied.

If Congress should now pass an act withdrawing its right to be sued for the refund of taxes, then as to all future tax collections, courts must hear taxpayers on bills for injunction; but, as for all taxes previously paid, the taxpayer would be without remedy in spite of the fact that, when taxes were paid, provisions for refund were assured to him.

Congress has recently enacted the Social Security Act which, in certain parts, imposes large taxes on employees and employers for old age pensions and unemployment insurance. Under the Social Security Act and the general acts of Congress with reference to refunds and against injunctions, taxpayers are assured their day in court as to

the general legality of these acts and as to their application to particular taxpayers under and by virtue of the provisions for refund which are assured to them without qualification. These taxes so imposed under the Social Security Act are being collected and are being paid by taxpayers (both employees and employers) on the faith of these statutes. But, if the opinion in this cause should be sustained, then all such taxes would be paid at the taxpayer's risk; for Congress could pass an act prohibiting *all refunds*, whether in suits against collectors or against the United States, and the protection of the Fifth Amendment, which provides that no property shall be taken without due process of law, would be completely evaded and made of no effect.

In view of the huge sums now in process of collection, not only under the Social Security Act but under all forms of taxation and being paid by the taxpayers in reliance upon the right of refund for taxes illegally or erroneously collected or assessed, the seriousness of this situation should be apparent to the court.

In the early days, before the system of refunds was established, the acts of Congress for excise and other taxes provided taxpayers a day in court as to the legality or erroneous assessment of taxes *before* the taxes were collected. This has been pointed out in the case of *Phillips* v. *Commissioner*, 283 U. S. 589, at page 595 (footnote). It is there also said, pages 595-597:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. *Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights*, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States*, 92 U. S. 85, 88-89; *Springer* v. *United States*, 102 U. S. 586, 594; *Hagar*

v. *Reclamation District No. 108*, 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan*, 245 U. S. 552; *Ng Fung Ho* v. *White*, 259 U. S. 276, the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue.

* * * * * *

"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Rowland*, 196 U. S. 611, 631. * * *" (Italics ours.)

It will be noticed in the foregoing case that the Supreme Court had in mind *the total effect of the Fifth* Amendment which provides that no person shall be deprived of life, liberty *or property* without due process. It further recognizes that in cases of personal liberty the defendant is granted an earlier hearing than in the taking of property. *But the right to a hearing is guaranteed by the system of refunds in all tax cases.* Without this guaranty, where adequate opportunity is afforded for a later judicial determination of legal rights, those legal rights must be granted *before* the taxpayer is deprived of his property.

Also, in all of the following cases, the Supreme Court has recognized the right of the government to take property for taxation in advance of a determination of the validity of the taking; but, by providing for unqualified refunds, has established a *system of corrective justice* which adequately complies with the Fifth Amendment to the Constitution:

State Railroad Tax Cases, 92 U. S. 575, 613.

Snyder v. *Marks*, 109 U. S. 189.
Dodge v. *Osborne*, 240 U. S. 118.
United States v. *Jefferson Electric Co.*, 291 U. S. 386, 395-396.

It must also be noticed that it has been specifically held by the Supreme Court that, with respect to the collections *and refunds* of taxes, the law must comply with the Fifth Amendment to the Constitution, *and that the authority of Congress to withdraw the consent of the United States to be sued is no adequate argument.*

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, the court had under consideration the validity of Section 607 of the Revenue Act of 1928 which provided that taxes assessed or paid after the period of limitation should not be refunded to the taxpayer where the taxpayer had filed a claim in abatement or the collection of the tax had been stayed. The court tested this act under the due process clause and held it valid but then said, pages 430-431:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra*, at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States*, 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, *it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.* See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 679, 680."

To the same effect was *United States* v. *Jefferson Electric Company*, 291 U. S. 386 at 403, citing the foregoing case.

This is a suit against the Collector: "The one who committed the wrong"; the one who, in the case of *Rickert Rice Mills Company* v. *Fontenot*, 297 U. S. 110, this court held to be a trespasser. In the foregoing case and in the following cases, the Supreme Court has recognized that suits against collectors are personal actions and not governed by the same rules as suits against the United States:

Sage v. *United States*, 250 U. S. 33, 37.
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1.
Union Trust Co. v. *Wardell*, 258 U. S. 357.
Levy v. *Wardell*, 258 U. S. 543, and
Bonkers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 398.

It should also be noticed that Title VII of the Act of 1936 on which the Government relies is not merely an attempt to withdraw the right of the United States to be sued. The sections relating to that subject are inseparably connected with the other parts of the statute; so that the total effect of the act is to deny the fundamental right of the taxpayer to a refund of the taxes paid. The United States can take the property of a taxpayer in advance of a judicial determination as to the right of taking *only because and if a system of corrective justice has been worked out which preserves that right intact and gives the taxpayer substantially the same remedy that he would have if the judicial determination were made in advance of taking.*

If this were not true then, as above stated, no taxpayer is safe in paying any taxes. And if the opinion of the Court of Appeals in the case at bar represents the law, then the entire system upon which taxpayers have constantly relied and by which the government has supported them for many years is *destroyed.*

It will be noticed that we are not here urging that for these reasons the Act of 1936 is necessarily unconstitutional. Our only point is that the Act of 1936 must be tested under the due process clause of the Constitution just as the Act of 1928 was tested in the case of *Graham & Foster* v. *Goodcell*, 282 U. S. 409, and that the theory of the government that the right of a sovereign to determine when it shall be sued *is not conclusive.*

For the foregoing reasons, we submit that the court should take the above entitled cause and should then consider whether or not the 1936 Act complies with the Fifth Amendment to the Constitution. In so doing, the court should direct its attention to the following points.

1. The Act of 1936 is retroactive in character and deprives the taxpayer of a vested right.

2. The Act of 1936 is not a provision for refunds but a provision for the denial of refunds. It provides for no refunds except to the taxpayer. Those who have paid the taxes to the taxpayer in the price of goods or by special agreement, *are deprived of all remedy.* If Congress was right in thinking that practically all of the Agriculture Adjustment Act taxes were "passed on," then the Act of 1936 is a mere attempt to retain in the Treasury practically all of the A. A. A. taxes and to *grant practically no refunds to any one.* This is a material distinction between the Act of 1936 and the act before the court in *United States* v. *Jefferson Electric Company*, 291 U. S. 386 where the Act under consideration *provided for a refund of all taxes* illegally collected and merely that certain refunds should be paid to a third person.

3. The Act of 1936 is a substantive amendment of a tax law (which was unconstitutional) changing that law (in effect) into a tax on the consumer, and then denying him a remedy.

4. The system of refunds which is provided for in the

1936 Act provides for inequality among taxpayers and is therefore invalid.

5. The 1936 Act bases the test of refund on subject matter which does not relate to the passing on of the tax and is therefore invalid.

6. The 1936 Act is based upon an economic theory which has been rejected as inconsistent with the law. (*Lash's Products Co.* v. *United States*, 278 U. S. 175; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Liggett & Myers Tobacco Co.* v. *United States*, United States Supreme Court, Opinion of January 4, 1937; and *Brief for Government* filed in said cause.)

7. Proof required for refunds under the 1936 Act is based upon assumptions which are impossible to make as in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216.

Respectfully submited,

WILLIAM B. MCILVAINE,
As Amicus Curiae.

I hereby certify that the written consents of Messrs. Sutherland, Tuttle & Brennan, First National Bank Building, Atlanta, Georgia, and of the Solicitor General of the United States have been filed with the Clerk of this Court.

WILLIAM B. MCILVAINE.